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ATTORNEY GENERAL

June 15, 2009

RE: GM Bankruptcy/Purported Preemption of State Laws

Dear Colleagues:

Most of you are familiar with the issues raised by the bankruptcies of Chrysler and GM. These companies, purporting to rely on the provisions of the Bankruptcy Code, have sought sales and rejection orders that would circumvent numerous state laws designed to protect our citizens, in areas ranging from lemon law enforcement to workers compensation coverage to laws providing protections for dealers selling the products of these manufacturers. The actions of a number of States, with the assistance of NAAG's Bankruptcy Counsel, resulted in numerous improvements in the Chrysler case. Those changes included the assumption by the purchaser of liability for the vast majority of lemon law claims and workers' compensation claims, and amendment of the dealer rejection order so as to remove or greatly reduce any language purporting to determine that the order preempted rights by dealers to assert their rights under the laws of our States.

We are now facing many of the same issues with respect to GM, but, in some respects, in an even more harmful fashion. We have begun the same dialogue with GM about the issues other than the dealer laws and are hopeful they can be resolved fairly readily. The dealer issues, however, I expect, will present a much harder case and will need our own direct involvement.

As I assume you know, GM recently sent out letters to both the dealers that it intended to cease doing business with as well as the dealerships that it does not intend to close. Both letters indicated that the dealers must sign them to amend their current dealership agreements and that those amended agreements would then be presented to the Bankruptcy Court for its approval of their being assumed and assigned to the acquiring entity ("Newco"). As to both groups, GM informed them that a failure to sign the agreements without changes or negotiation by June 12 could result in the rejection of the dealer's current agreement. Non-retained dealers were offered \$70,000 in termination assistance and the right to continue operations until the end of 2009 (but with no right to buy any additional vehicles) if they signed the agreement in lieu of all other termination rights under State laws. If they did not do so, GM would move to reject their

agreement immediately and offer nothing (not even the help in reallocating cars that Chrysler offered). Tentatively retained dealers were required to execute the changes to avoid being placed on the rejection list with the same options offered to the other group.

Both proffered agreements initially required the signatories to waive all of their rights under State law; while the retained dealer agreement retreated from that provision in a subsequent amendment, the rejected dealer agreements continue to retain that language – indeed, providing that the dealer may be enjoined from asserting that any provision of the agreement he is being asked to sign is unenforceable under state law. There are a variety of other problematic provisions in the agreement – terminating dealers, for instance, are required to immediately turn over all of their customer information and are barred from any protest over a new dealer being moved into their area and soliciting business from their customers, even while their dealer agreements remain in place. The retained dealers were initially told that they must order cars sufficient to meet unilaterally increased sales quotas, and must eliminate all non-GM brands from their premises by December 31, 2009 – in violation of the laws of numerous states that bar dealers from being required to order unneeded inventory or to limit the brands that they must sell. The revised agreement purports to soften those requirements, but GM reserved the right to limit brands in certain markets and some States report that dealers who have signed the agreement have already been pressured to take on unwanted inventory.

There are other problems but I will list just two other provisions – one purports to require dealers to keep the terms of the agreement confidential (thereby impeding our ability to determine whether these agreements are illegal) and a second that purports to give the bankruptcy court *exclusive* jurisdiction to determine any issues related to these agreements in perpetuity (which contradicts the provisions of the Bankruptcy Code that protect the policy and regulatory rights of government agencies, and the limited jurisdiction of bankruptcy courts after a case is closed.) The attempt to contractually circumvent our laws is exacerbated by terms of the proposed sale order which, among other provisions, includes provisions stating that “No law of any state or other jurisdiction, including any bulk sales law or similar law, shall apply in any way to the transactions contemplated by the 363 Transaction, the MPA, the Motion, or this Order” and requiring the immediate transfer of any relevant license, permits, and the like, regardless of whether state law would limit such transfers.

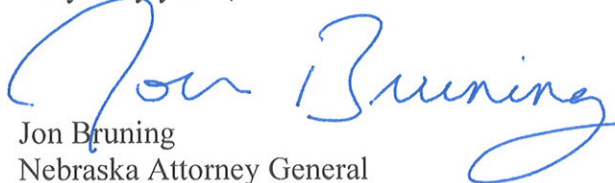
In short, while it is not our goal to block this sale or to preclude GM and Newco from using their business judgment about their dealer needs, the demands made on the dealers in the June 12 letter are unconscionable and the type of conduct that our offices regularly step in to stop. Specifically, these demands impair or destroy current franchise rights of our citizens in our respective states and eliminate the protections that would be afforded by dealer franchise acts. Moreover, GM seeks to abrogate consumer protection laws and violate antitrust statutes – preemption efforts that we do not believe are allowed under the Bankruptcy Code and that create detrimental precedents for future cases.

GM may, with the approval of the bankruptcy court, reject franchise agreements with dealers, but rejection, by the terms of the Code, merely establishes a breach of contract. It does not revoke those contracts or eliminate the effect of state law as to what follows a breach. Even less so, can state law be ignored in the procedure being used by GM – namely, to force changes

to agreements that it then proposes to assume and assign to Newco. (Indeed, it is black letter law under the Bankruptcy Code that contracts must be assumed as written, with all of their rights and obligations – a proposition that GM is seeking to stand on its head by coercing revisions to the agreements before it agrees to assume them). GM may not unlawfully coerce dealers into giving up their rights and virtually ignore state laws with respect to franchises. These overreaching new franchise agreements would give the new GM complete control over the retained dealers and their segment of the industry. The June 12 letter is a possible violation of the antitrust laws, since it would give GM a level of vertical integration and control over its dealers far in excess of anything that would be allowed by law with respect to any other competing manufacturer.

As president-elect of our national association, I urge that you join me in filing objections with the bankruptcy court. We also may need to file an additional action in the federal bankruptcy court in New York against GM, for both injunctive and declaratory relief to preserve our States rights to enforce our laws in regards to the sales transaction as a whole, and the dealer agreements in particular. Likewise, I have asked the Antitrust Committee Chairs, AGs Cordray and Koster to initiate an investigation into possible antitrust violations. I am sending you this letter as a “heads up” and so you can consult with your staff before you leave for the summer meeting. A draft objection will be available by Tuesday morning and can be discussed during one of our Executive Sessions. The objection must be filed by 5 pm Eastern time on Friday, June 19. We will also work on putting together a draft complaint as soon as possible.

Very truly yours,

  
Jon Bruning  
Nebraska Attorney General